IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 366

UNITED STATES OF AMERICA,

Petitioner,

v.

JASPER WHITE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF JASPER WHITE IN OPPOSITION

ROBERT J. FITZSIMMONS,
Attorney for Jasper White.

JOHN J. MOONEY,
WARREN H. MAYELL,
of Counsel.

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Opinion Below

The majority (R. 20-23) and dissenting (R. 23-25) opinions in the Circuit Court of Appeals are reported in 137 F. 2d 24. The decision of the District Court rejecting Respondent's claim to immunity and holding him in contempt of court appears at (R. 8-14).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered May 24, 1943 (R. 26), and a petition for rehearing (R. 26-31) was denied on June 18, 1943 (R. 31). The petition for a writ of certiorari was filed September 18,

1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented

Two questions are presented for determination. They are:

(1) May a member of a labor union who is in possession of the books and records of that association and who appears in response to a grand jury subpoena duces tecum, directed to the union, refuse to comply with the subpoena on the ground that production of the records called for might tend to incriminate him?

(2) Did the Circuit Court of Appeals have jurisdiction when the Appeal to it from a judgment of Criminal Contempt was taken by filing notice of appeal pursuant to the Criminal Appeals Rules and without formal written application for appeal as provided by Section 8 (c) of the Act of February 13, 1925?

Constitutional and Statutory Provisions Involved

The Fourth Amendment of the Constitution provides in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

The Fifth Amendment provides in part:

> "No person * * * shall be compelled in any criminal case to be a witness against himself."

Section 8 (c) of the Act of February 13, 1925, 43 Stat. 940, 28 U. S. C. sec. 230, provides:

> "No writ of error or appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree."

Statement

The United States District Court for the Middle District of Pennsylvania in December, 1942, issued a subpoena duces tecum addressed to Local No. 542, International Union of Operating Engineers. This subpoena called for the production of certain books, records and documents before a grand jury of that Court (R. 45). The subpoena was duly served upon the president of the union. Respondent appeared before the grand jury on January 11, 1943 and stated that he was the Assistant Supervisor of the union. Respondent informed the grand jurors that he had brought with him the books, records and documents specified in the subpoena (R. 2-3). He then read a statement which had been prepared for him by counsel and refused to turn over the books, records and documents, claiming "on behalf of Local Union 542, its officers and members, and on my own behalf, the immunity guaranteed by the Fourth and Fifth Amendments of the Constitution of the United States" (R. 2-3).

The respondent was requested to return on January 13, 1943. The grand jury on January 13, 1943 filed a presentment with Judge Albert W. Johnson, presiding at a term of the District Court, charging the respondent with being a contumacious witness and requesting that he be punished (R. 1-2). The Judge on January 14, 1943 conducted a hearing with respect to the presentment. At that time

arguments of counsel were heard. The respondent was present in the court room with the books, records and documents. The Judge did not examine them. He delivered an oral opinion rejecting the respondent's claim to immunity on the theory that a labor union cannot avail itself of the privilege against self incrimination (R. 7-10). The Judge then called the respondent to the bar and ordered him to produce the books, records and documents. The respondent refused to comply and again stated: "* * * I refuse to produce the books or documents referred to in said subpoena, upon the ground that they may tend to incriminate Local No. 542 of the International Union of Operating Engineers and myself as an officer thereof and/or individually. I therefore claim on behalf of Local No. 542, its officers and members, and on my own behalf, the immunity granted under the Fourth and Fifth Amendments of the Constitution of the United States" (R. 11). The Judge then held the respondent in contempt of Court and sentenced him to imprisonment for thirty days (R. 6-7). Respondent was subsequently admitted to bail on his personal bond of one hundred dollars, pending the determination of an appeal by him to the United States Circuit Court of Appeals for the Third Circuit. Respondent filed a notice of appeal pursuant to Rule 3 of the Criminal Appeals Rules (R. 17-18).

The Circuit Court of Appeals reversed the judgment of contempt and remanded the case to the District Court with instructions to that Court to sustain respondent's claim of privilege if it found as a fact that respondent in addition to being an officer of the union was also a member and if it further found that the documents called for by the subpoena did tend to incriminate him (R. 23). Judge Biggs dissented from the majority opinion (R. 23).

The Government filed a petition for rehearing with the Circuit Court of Appeals. The Government in this peti-

tion raised for the first time a question as to whether the Circuit Court of Appeals had jurisdiction to hear respondent's appeal (R. 26-31). The petition for rehearing was denied without opinion (R. 31).

Argument

1. The Court below in reversing the judgment of the District Court held that an officer of a labor union, if also a member, may refuse to produce books and records of the union upon the ground that they might incriminate him. Such a holding is not at variance with any decision of this Court. On the contrary, it is a logical development of fundamental constitutional rights under the Fourth and Fifth Amendments to the United States Constitution. This Court has held that compulsory production of books and papers for the purpose of making a person give evidence against himself in a criminal case not only constitutes a violation of the express provisions of the Fifth Amendment but also is an "unreasonable search and seizure" prohibited by the Fourth Amendment. *Boyd* v. *United States*, 116 U. S. 616.

The Court in the Boyd case (*supra*), however, laid down one rule which must be met before the privilege against self-incrimination can be claimed. This rule requires that the books and papers with respect to which the privilege is asserted must be the witnesses' own books and papers. The Court below, in the majority opinion, in the instant case, recognized the existence of this rule.

The Government in both its brief and argument before the Circuit Court of Appeals compared a labor union to a corporation. From the analogy so drawn the Government concluded that an officer of a labor union could not assert the privilege with respect to books and records of the union. The Court below correctly rejected the position taken by the Government.

Concededly a corporation may not avail itself of the privilege against self-incrimination. *Hale* v. *Henkel*, 201 U. S. 43, nor may a corporate officer refuse to produce corporate records on the ground that they may tend to incriminate him personally. *Wilson* v. *United States*, 221 U. S. 361.

The reasons for such an exception to the general rules of privilege are clearly stated in both *Hale* v. *Hinkel* and *Wilson* v. *United States* (*supra*). A corporation is a creature of the State. From the State it receives certain privileges and franchises which are prerequisites to its existence. Its right to continue as a corporation is governed by the laws of the State of its incorporation and by the terms of the charter, which it has received. The State in the exercise of its sovereignty may at any time inquire as to the manner in which the corporate franchise is being employed. To that end, it may not only demand that the corporation maintain books and records but may also require that the books and records be produced for inspection by State officials whenever the affairs of the corporation are the subject of inquiry. The books and records of a corporation are not the books and records of its stockholders, officers or directors. They are the books and records of a separate legal entity.

As has been pointed out by the Court below in the majority opinion, the status of the labor union of which respondent is Assistant Supervisor differs from that of a corporation. A labor union although recognized as an "entity" for collective bargaining purposes, is not, in fact, a legal entity created by the State. Its officers and members are subject to penal laws covering violence and protection of property. Its officers and members are subject to civil suit and are individually liable for damages. Labor unions and their officers and members remain unfettered by rigid statutory regulations defining and prescribing the power of a corporate body. A trade union is

a voluntary non-profit making unincorporated association. The books and records kept in running the affairs of the membership are the private property of the members. It is true that the books and records called for by the subpoena served upon the union's president in this case were not the property of the respondent exclusively. They were the books and records of all the members of the unincorporated association. They were the private property of the members. The respondent, if a member of the Union, could refuse to produce the books and records called for upon the grounds of personal self-incrimination and still comply with the rule of *Boyd* v. *United States* (*supra*) requiring that the books and records upon which the claim of privilege is based, be the witness' own property.

The Court below in reversing the judgment was not unaware of the fact that the law, for procedural purposes, has recognized that unions function in many respects as entities. Federal legislation has unquestionably conferred substantial privileges upon labor unions. The Courts in sanctioning *bona fide* trade union activities have reiterated the principle that the rights of a labor union are in the aggregate the rights and privileges of the individual members. Fundamental among such rights and privileges is the privilege against self-incrimination. To hold that by the enactment of beneficial labor legislation, the books and records of labor unions have become subject to visitorial inspection by the Federal Government, which would prevail despite the assertion of a fundamental constitutional right by a member of a union in possession of its books, is to place the unincorporated association in the same category as a corporation. Both the majority (R. 22) and the dissenting opinion (R. 24, note 5) in the Court below, rejected the contention of the Government that labor unions belong in the same category as corporations. The dissenting opinion, therefore, denied to the members of a

trade union a privilege which can logically be excluded only on the grounds set forth in *Hale* v. *Henkel* (*supra*) and *Wilson* v. *United States* (*supra*).

2. The majority opinion in the Court below in reversing the respondent's conviction cited as an authority *Brown* v. *United States*, 276 U. S. 134. The Brown case involved an appeal by the defendant from a judgment of conviction for contempt of court in failing to produce the books and records of an unincorporated association of which he was an officer. When presented to the District Court as a contumacious witness, Brown contended that the books and records would tend to incriminate him personally. He therefore asserted his privilege under the Fifth Amendment to the United States Constitution. Brown did not produce the books and records before the District Judge for his examination as to whether or not they would tend to incriminate. He merely asserted the privilege. It was because of that fact that this Court on appeal expressly left undetermined the question as to whether the privilege could have been asserted after the production of the books and records. This Court, however, did strongly indicate that the claim of privilege would be sustained if the books and records had been produced and they had, in fact, tended to incriminate him personally. *Brown* v. *United States*, 276 U. S. 134, at 144. See also *Corretzer* v. *Draughon*, 88 F. 2d 116, 118 (C. C. A. 1).

3. *Certiorari* should not be granted in the present case because the decision of the Circuit Court of Appeals is not final. The Circuit Court directed that the case be remanded to the District Court to ascertain whether or not respondent was, in fact, a member of the union and, if that be the case, to examine the books and records to determine whether or not they did tend to incriminate him. If both these facts be established, the District Court was then to sustain the respondent's claim of privilege. If this case

be remanded to the District Court in conformity with the judgment of the Court below, a determination may be made that the books and records are not incriminating. In that event, the decision of the District Court might not be brought up for review. If this Court should presently grant *certiorari*, it may determine a question which will not actually arise in the District Court. If *certiorari* is not granted by this Court, and the District Court sustains the respondent's claim to privilege, the Government could then appeal directly to this Court. The Criminal Appeals Act, Title 18, United States Code, Section 682, provides a direct appeal by the Government to this Court from a judgment sustaining a special plea in bar when the defendant has not been put in jeopardy. This Court has held that self-incrimination may be asserted as a special plea in bar *United States* v. *Murdock*, 284 U. S. 141. This Court in the Murdock case (*supra*) further held that it would have jurdisdiction to hear the appeal by the Government even though the respondent did not particularly designate his plea of self-incrimination as a plea in bar in the District Court.

4. No real question relating to the jurisdiction of the Circuit Court of Appeals is presented. The appeal of the respondent was orally authorized and allowed by the District Court. The method to be followed by the respondent in perfecting his appeal, including specific directions as to the time for filing a notice of appeal and a record on appeal, was given by the District Court to the respondent's counsel with the consent of the United States Attorney (R. 11-14). Where an appeal is actually allowed in open court, a formal petition for allowance of appeal and an order thereon is not essential.

See:

Sage v. *Railroad Company*, 96 U. S. 712;
Brown v. *McConnell*, 124 U. S. 489;

Draper v. *Davis*, 102 U. S. 370;
Brandies v. *Cochrane*, 105 U. S. 262.

The failure to file a petition for allowance of appeal is not a jurisdictional defect even where there is no actual allowance in open court as in the present case. This Court has so stated in *Alaska Packers Assn.* v. *Pillsbury*, 301 U. S. 174 and *Reconstruction Finance Corporation et al.* v. *Prudence Securities Advisory Group et al.*, 311 U. S. 579.

Following the decision of this Court in *Nye* v. *United States*, 313 U. S. 33, wherein it was held that an appeal from a judgment of criminal attempt should be taken by petition for allowance of appeal rather than by filing notice of appeal, Title 18, United States Code, Section 689 was enacted. This extended the provisions of Sections 687 and 688 of Title 18 to proceedings to punish for criminal contempt of court. Sections 687 and 688 of Title 18 give to this Court the power to prescribe rules of practice and procedure in criminal cases. The enactment of Section 689 of Title 18 was apparently taken by the District Court in the case at bar as an indication that the decision in *Nye* v. *U. S.* (*supra*) was no longer to be considered in determining the method of appeal from a judgment of criminal contempt and that the rules promulgated under Sections 687-688 of Title 18 were now applicable to proceedings to punish for criminal contempt.

The respondent should not be prejudiced by a latent claim of lack of jurisdiction in the Circuit Court of Appeals to hear his appeal when it was perfected in good faith, with all possible diligence and in accordance with the directions of the District Court.

Conclusion

For the reasons stated the petition for a writ of *certiorari* should be denied.

October 25, 1943.

Respectfully submitted,

ROBERT J. FITZSIMMONS,
Attorney for Jasper White.

Of Counsel:

JOHN J. MOONEY,
WARREN H. MAYELL.